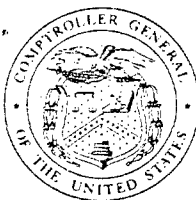


PLM-1

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

10,389

FILE: B-194879

DATE: June 6, 1979

MATTER OF: The Perkin-Elmer Corporation

DIGEST:

71001479

1. Where solicitation lists approved sources for which first article testing will be waived, timely protest contending competitor's device was improperly on list would be reviewed by GAO to determine if waiver was arbitrary or capricious. However, such protest is dismissed as untimely when filed after bid opening date since alleged impropriety was apparent on face of invitation for bids.
2. [Objection to agency's affirmative determination of another bidder's ability to meet specification] is not reviewed by GAO except in limited circumstances not present here.
3. Protester's request for test data should be made to procuring agency since GAO does not have authority to determine that records of another agency must be released under the Freedom of Information Act.

The Perkin-Elmer Corporation (Perkin-Elmer) protests the contract award to Electronic Controls, Inc. (Electronic Controls), by the Defense Electronics Supply Center, Dayton, Ohio under solicitation No. DLA 900-79-B-2203.

The agency advised Perkin-Elmer that the devices to be supplied by Electronic Controls had been subjected to extensive testing under a similar previous procurement and were found to be totally in compliance with the specification pertaining to devices with clutch mechanisms. The protester offers a device without a clutch as permitted by the specification, and contends that the Electronic Controls device cannot meet another required specification which applies both to devices with and to those without clutches. Perkin-Elmer states that there

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has not been an adequate showing that the device offered by Electronic Controls has been subjected to first article testing to demonstrate compliance with all specifications.

For reasons discussed below, this protest is dismissed.


We have reviewed agency determinations to waive first article testing where the determination to waive affected the relative standing of the bidders. Julian A. McDermott Corporation, B-187705, B-188197, April 18, 1977, 77-1 CPD 266. Where, as here, the waiver is announced in the solicitation and could affect competitive standing, we would consider a timely protest to determine if the waiver was arbitrary or capricious. Charles J. Dispenza & Associates, B-186133, April 27, 1977, 77-1 CPD 284; Homexx International Corporation, B-192034, September 22, 1978, 78-2 CPD 219. However, in our view, this protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1978). A protest based upon alleged improprieties apparent on the face of the solicitation must be filed prior to bid opening date. The solicitation dated March 15, 1979 indicated that the devices of both Electronic Controls and Perkin-Elmer were approved for acceptance without first article testing. The bid opening date was April 5, 1979 and the protest was not received until May 16, 1979. It should have been received prior to bid opening.

To the extent that this protest challenges the ability of Electronic Controls to provide a device complying with the specification, it questions the contracting officer's affirmative determination of the awardee's responsibility. See Defense Acquisition Regulation (DAR) §1-904 (1976 ed.). This Office does not review protests which question such determinations of responsibility unless either fraud on the part of the procuring officials is alleged, or the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376 and Airtronics, Inc., B-192400, August 4, 1978,

78-2 CPD 90. Perkin-Elmer has made no allegations of fraud and the solicitation which it submitted with its protest contains no definitive responsibility criteria.

Perkin-Elmer's request for the test data concerning Electronic Controls' device should be directed to the procuring agency. This Office is without authority under the Freedom of Information Act, 5 U.S.C. 552 (1976), to determine what records an agency must release upon request. Systems Research Laboratory, Inc.--Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341.

This protest is dismissed.

A handwritten signature in cursive script, reading "Milton J. Sogolar".

Milton J. Sogolar
General Counsel